The foregoing case, we believe, is almost of first impression. A similar state of facts existed in *Ensworth* v. *N. Y. Ins. Co.*, 7 Am. Law Reg., N. S., 332, and *Machette* v. *New England Mutual Ins. Co.*, Phil'a Legal Intelligencer, May 3, 1867 (referred to in note 7 Am. Law Reg., N. S., 335), but the points of law discussed were different. J. T. M.

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## *Supreme Court of Pennsylvania.*

### DENSMORE OIL CO. *v.* DENSMORE ET AL.

The owners of any property may form an association or partnership with others, and may sell their property to the company at any price agreed on, provided there be no fraudulent representations made by them, and no such confidential relation arises, as to make them liable to account for any profit realized on such sale.

But where persons have formed an association, or are dealing in contemplation of one, then they stand in a confidential relation to each other and to all who may subsequently become members, and they cannot purchase any property and sell it to the company at an advance without a full disclosure of all the facts. If they do so the company may compel them to account for the profit.

An oil company was formed upon property belonging to some of the defendants: the valuation of the property was represented by stock to a certain amount, and part of this stock was given by the defendants who had owned the land to the other defendants who became the active parties in getting up the company. Held (no misrepresentation being proved), that neither class of the defendants were liable to other subscribers to the stock of the company.

APPEAL from the Court of Nisi Prius. In Equity.

The opinion of the court was delivered by

SHARSWOOD, J.—There are two principles applicable to all partnerships or associations for a common purpose of trade or business, which appear to be well settled on reason and authority.

The first is, that any man or number of men, who are the owners of any kind of property, real or personal, may form a partnership or association with others, and sell that property to the association at any price which may be agreed upon between them, no matter what it may have originally cost, provided there be no fraudulent misrepresentation made by the vendors to their associates. They are not bound to disclose the profit which they may realize by the transaction. They are in no

sense agents or trustees in the original purchase, and it follows that there is no confidential relation between the parties which affects them with any trust. It is like any other case of vendor and vendee. They deal at arms length. Their partners are in no better position than strangers. They must exercise their own judgment as to the value of what they buy. As it is succinctly and well stated in *Foss* v. *Harbottle*, 2 Hare, 489, "A party may have a clear right to say, I begin the transaction at this time. I have purchased land, no matter how or from whom, or at what price. I am willing to sell it at a certain price for a certain purpose." This principle was recognized and applied by this court in the recent case of *McElhenny's Administrators* v. *The Hubert Oil Co.*, decided May 11, 1869, Legal Intelligencer of 1869, p. 181, "It nowhere appears," said the present chief justice, "that McElhenny, the purchaser from Hubert, the original owner, did it as the agent of Messrs. Baird, Boyd & Co. and others, though he bought it to sell again, no doubt; he had a perfect right, therefore, to deal with them at arms length, as it seems he did." And again: "If the property was not purchased by McElhenny for the use, and as agent for the company, but for his own use, he might sell it at a profit, most assuredly. No subsequent purchasers from his vendees would have any right to call upon him to account for the profits made on his sale." In that case, McElhenny, being the owner of property which cost him only $4,000, sold it to Baird, Boyd & Co. and others who associated with him to form an oil company, for $12,000, and it was decided that the company could not call him in equity to account for the profit he had made.

The second principle is, that where persons form such an association, or begin or start the project of one, from that time they stand in a confidential relation to each other, and to all others who may subsequently become members or subscribers, and it is not competent for any of them to purchase property for the purposes of such a company, and then sell it at an advance without a full disclosure of the facts. They must account to the company for the profit, because it legitimately is theirs. It is a familiar principle of the law of partnership, one partner cannot buy and sell to the partnership at a profit; nor if a partner-

ship is in contemplation merely, can he purchase with a view to a future sale, without accounting for the profit. Within the scope of the partnership business each associate is the general agent of the others, and he cannot divest himself of that character without their knowledge and consent. This is the principle of *Hichens* v. *Congreve*, 4 Russ., 562; *Fawcett* v. *Whitehouse*, 1 Russ. & M., 132, and the other cases which have been relied on by the appellants. It was recognized in *McElhenny's Administrators* v. *The Hubert Oil Co.*, just cited; and also in *Simons* v. *The Vulcan Oil Co.*, decided by this court May 11, 1869, Legal Intelligencer of 1869, p. 332. Both of these cases were complicated with evidence of actual misrepresentations as to the original cost of the property to the vendors. In the opinion of the court in the last case delivered by THOMPSON, C. J., it is said: "If the defendants in fact acted as the agents of the company in acquiring the property, they could not charge a profit as against their principal. Nor was their position any better if they assumed so to act without precedent authority, if their doings were accepted as the acts of agents by the association or company. If, in order to get up a company, they represented themselves as having acted for an association to be formed, and proposed to sell at the same prices they paid, and their purchases were taken on these representations, and stockholders invested in a reliance upon them, it would be a fraud on the company, and all those interested, to allow them to retain the large profits paid them by the company in ignorance of the true sums actually advanced." The defendants in that case were subscribers, with others, to the stock of a projected oil company; and after it had been formed, secured to themselves, by contract, the refusal of the property which they afterwards sold to the company at a greatly advanced price.

The question now presented is, under which of these two principles is the present case to be classified. That will depend upon the facts, which, though the testimony is somewhat voluminous, may be briefly stated. Densmore, Roudebush and Canfield, three of the defendants, were the owners of certain lands, leases and rights in Venango County, in the oil region. They had acquired them, so far as appears, with no idea of disposing of them or of

forming a company, but had spent over $100,000 in improving and developing them while they were owners. In March, 1864, they came to Philadelphia to ascertain whether they could be sold to advantage. They called upon Mr. Lawrence, another of the defendants, and consulted him as to the best mode of effecting this object. They stated that they were willing to accept $202,000, provided that sum could be procured clear of all expenses. That seemed impossible, unless by naming a price so much beyond that sum as would cover all such probable expenses and contingencies. The only mode by which so large an amount could be realized was by the organization of a stock company, and to do that effectively persons must be employed as agents to sell or solicit subscription to the stock; and they must be gentlemen of character and influence, well acquainted with the subject, who could bring the land to the notice of those desirous of engaging in such an enterprise. The amount to be raised was large; the result uncertain. Several agents must be employed, and their compensation must be at a liberal rate. It was arranged that the price should be fixed at $250,000; that the stock should be 50,000 shares at $10 a share, and $5 to be paid in cash. Mr. Densmore and his associates agreed to take $122,500 in money, and the balance in stock, and that from this stock they would compensate the agents for their services. Mr. Densmore, who was examined as a witness on behalf of the appellants, testified: "The $122,500 was the proceeds of the sale of 24,500 shares. That added to the 16,000 shares we were to get, amounted to 40,500 shares. The arrangement, as I understood it, was that Messrs. Lawrence, Hugel, Watson, and perhaps parties unknown to me, were to receive the balance of the stock for their services in forming the company and disposing of the stock." The gentlemen named were accordingly engaged for this purpose. They proceeded and did sell the 24,500 shares in order to make the cash payment. There was no subscription-paper. Mr. Lawrence and his associates did not subscribe for any stock. They did not appear, and were not held out as subscribers to those who made purchases from them. It is true, that after the company was organized the stock which they were

to receive from Densmore, Roudebush and Canfield as a compensation for their services, was issued to them directly—not to the vendors, and by them transferred. But this was done by a special order, as is satisfactorily explained in the testimony of E. B. Schneider: "I heard Mr. Densmore request Mr. Lawrence to have the Densmore stock, which he (Mr. Lawrence), Watson, Hugel and Whitney were entitled to, issued direct to themselves, as he might not be here when the certificates would be ready." It has not been, and cannot be controverted, that the stock which they received was part of that, which, under the original terms of the sale, Densmore, Roudebush and Canfield were to have in payment of the purchase-money.

Now it can hardly be questioned, and, indeed, apart from their alleged liability as confederates with the other defendants, it has not been questioned, that Densmore, Roudebush and Canfield fall within the first principle hereinbefore stated. They had, for a considerable time, been the owners of the property, had acquired it with no reference to the formation of this or any other company, and had improved and developed it by a very large outlay of their own capital. They had a clear and undoubted right to put their own price upon it in the formation of a company, in which they were to be partners or associates. They did put upon it the price of $250,000, which, it is admitted at the rates at which such property was then selling in the market, was a fair and reasonable, nay, even a low price. "From my knowledge of mining properties in the oil region at that time," said N. B. Browne, Esq., in his testimony, "and especially of the leasehold and other interests conveyed to this company, I regarded their interests at the price named, $250,000, as cheaper than any that were offered in this market. Their actual productive value was very great; the leases were on what was regarded as the best territory on Oil Creek." Had Messrs. Densmore, Roudebush and Canfield employed no agents, but sold all the stock themselves, the transaction as to them could not have been impeached. They certainly stood in no confidential relation to the subscribers or purchasers of the stock in the future, when they acquired the property. This is neces-

sary, as we have seen. A company or partnership must have been then formed or forming, or at least the project must have been started, in order that any confidential relation should arise. How, then, is their position varied by the fact that they employed agents and agreed to compensate these agents by a transfer of a certain part of the stock they were to receive? It is not easy to see. The whole $250,000, money and stock, when received, was their own absolute property: they could give or transfer it to whomsoever they pleased. If, as we have seen, they stood in no confidential relation to the company, no trust could attach to the price or any part of it in their hands. We may dismiss, therefore, the case of Messrs. Densmore, Roudebush and Canfield, as clearly within the first principle to which we have before adverted.

But what confidential relation did the other defendants sustain to the purchasers of the stock or to the company? It is a clear and unquestionable fact in the cause, that they did not subscribe for a single share. Their contract was with Densmore, Roudebush and Canfield, to receive from them a part of their stock. Without an order from them, Mr. Lawrence and the others could not have compelled the company to issue any of it to them. If Densmore, Roudebush and Canfield had received all the certificates to which they were entitled, and then refused to transfer, the only remedy of Messrs. Lawrence and others would have been against them to recover damages for violation of their contract. It is clearly proved that the paper among the exhibits headed "Subscription List to the Densmore Oil Co.," was made out by Mr. Lawrence after the organization, as a list of those to whom certificates of stock were to be issued. The names of Lawrence, Whitney, Watson and Hugel appear on that list, but clearly only as appointees or assignees of Densmore, Roudebush and Canfield. The same appointment or order might have been given by them to mere strangers.

It is strenuously contended, however, that if these defendants did not stand in a confidential relation to the purchasers of stock, then there was nobody who stood in that relation. But is there anything extraordinary in that? Nine-tenths of

the transactions and contracts of life are at arms-length. If a man buys stock in the market of a broker, there is nobody who stands in any fiduciary relation to him. He acts on his own judgment. He is bound to pay the broker the price agreed, and the broker is bound, when paid, to deliver him the stock. This was the only relation in which Lawrence, Whitney, Hugel and Watson stood to those who bought stock from them, and who, according to all the testimony in the cause, so understood it. They supposed, as they state, that these gentlemen were to receive compensation for their services. What it was to be they did not inquire, because it was none of their business.

A strong effort, however, has been made to show that these defendants (Lawrence, Whitney, Watson and Hugel) were purchasers from Densmore, Roudebush and Canfield, of an interest in the property, and sold it at an advance. But of this there is not a spark of evidence. It can hardly be pretended that Densmore, Roudebush and Canfield could have held them liable on a contract to purchase any interest in the land, or that the agents could in any event have sued them for not conveying to them such interest. If this was so, how can it be contended that they were vendors of any part of the property to the company?

Densmore, Roudebush and Canfield were first and last the only vendors. They executed the deed, and very properly receipted for the whole of the purchase-money, for they were entitled to the whole of it. Nor is the fact that Lawrence, Whitney, Watson and Hugel, joined with Densmore, Roudebush and Canfield, as original corporators, and signed the articles for the organization of the company, under the Act of July 18th, 1863 (Pamph. L., 1864, p. 1102), a fact of any significancy. That act does not require that the corporators should be subscribers to stock. They need have no interest whatever in the company to be formed. They are mere instruments of the law for purposes of preliminary organization. The moment that is accomplished, the amount required as capital paid in, the necessary certificate signed, and the charter granted, they are *functi officio*. The corporation is thenceforth composed of the stockholders.

It is supposed that the cases of *McElhenny's Administrators* v. *The Hubert Oil Co.* and *Simons* v. *The Vulcan Oil Co.*, before referred to, ought to rule this cause. But an examination of the opinions in those cases will show that the facts upon which they were decided were entirely different from those which appear on this record. The defendants there were subscribers to the stock; they became purchasers of the property after the project of a company was started, and, moreover, falsely represented that they had purchased it at the same price at which they sold.

These facts, which were the grounds upon which those determinations were based, are not, as we have seen, the facts of this case. It is not pretended that any false representation was made by any of these defendants in the sale of the stock. Some other points have been raised, which are, however, sufficiently disposed of in the opinion below.

Decree affirmed and appeal dismissed at the costs of the appellants.

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*District Court of the City of Philadelphia.*

COX *v.* THE FARMERS' MARKET COMPANY.

The owner of property is not liable to a trespasser, or one who comes on it by mere sufferance, for negligence, even though the act complained of would be a nuisance in a public highway.

It is the duty of every person to take care of his own safety, and one who ventures along a private passage-way at night, does so at his own risk.

Between two market-houses there was a space of thirty feet wide running from one street to another. The space was paved both as a foot and cartway, and formed an open passage-way from street to street, which the public were in the habit of using, though both it and the market-houses were private property. *Held*, that the passage was not a public highway.

The purpose of the company in leaving open and paving the space being plainly to accommodate customers resorting to the market-houses, its acquiescence in the general use of the passage-way by the public was not a dedication to public use.

A person going along this passage-way at night, after market hours, fell down the steps of a basement opening on the passage-way. *Held*, that the company were not liable for his injuries.